COURT DECISIONS AND THE COMMON LAW.

There are in Anglo-American law two fundamentally opposing theories as to the relation of court decisions to the common law. According to one theory the law is conceived as an entity, existing apart from and antedating the decisions; *i. e.*, there is a complete body of pre-existent law or system of rules ready for application to any and every situation that may arise. There is much diversity of opinion among champions of this view of the law as to the nature of this pre-existent entity. It is usually spoken of as a body of usages or customary rules existing in society.[1] James C. Carter said, "The social standard of justice exists in the habits, customs and thoughts of the people".[2] Professor Hammond defines it as "a principle of order existing in society",[3] and Professor Beale says it is "the body of legal principles which is accepted by the legal profession."[4]

Expounders of this theory have had two views as to the relation this pre-existing entity, the law, bears to the decisions. One view is that the decisions of the courts always correspond to this entity; *i. e.*, the decisions of the courts are always conclusive evidence of what the law is. The other view is that the correspondence between the law and the decisions is not always exact—the decisions are evidence, but not conclusive evidence of the law.

According to the other theory, law is not conceived as existing apart from and antedating the decisions, but the decisions are in themselves law, or rather the rules which the courts lay down in making the decisions constitute law.[5]

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[1] 2 Bryce, Studies in History and Jurisprudence, 270-271.

[2] The Ideal and the Actual in the Law, 13th. Amer. Bar Assoc. Reports 225. This idea is developed more fully in Mr. Carter's book, "Law, Its Origin, Growth, and Function".

[3] 1 Notes to Blackstone, § 2.

[4] 1 Beale, Treatise on Conflict of Laws, 150.

[5] The writer is not considering legislation, but merely judiciary law. "Judiciary law consists of *rules*, or it is merely a heap of particular decisions inapplicable to the solution of future cases. On the last supposition, it is not law at all; And the judges who apply decided cases to the resolution of other cases are not resolving the latter by any determinate law, but are deciding them arbitrarily." 2 Austin, Jurisprudence (4th ed.) 686.

These rules are merely selections of certain facts, out of the larger number existing in any particular case that arises, as essential; and to these facts certain specific consequences are attached. See article by

From the earliest times until recently the whole legal profession of England and America acquiesced in the theory of pre-existent law. The profession has considered it no part of the judge's duty to make new or change existing law, but his duty was to expound and apply the old. In reports, this theory is met with constantly. In the trial of a cause, it is manifested in the assumption of judge and advocate that no question can arise which will call for the application of any but existing principles, and, again, in our procedure, in the assumption that a rule of law exists which will apply to every transaction that takes place and which defines the rights and duties of the parties to it.[6]

This first theory is usually referred to as the Blackstonian or the orthodox common law theory of law. While this theory was once apparently universally accepted by the legal profession, and is still generally adhered to by it, Austin's view that it is a childish fiction and that the rules which the judicial organs of the state lay

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John Henry Wigmore, 4 Virginia Law Rev. 248; Salmond, Jurisprudence (5th ed.) § 69.

The decisions bind only the parties to them, but it is the abstract rules —the facts selected as essential—the *ratio decidendi* as it is termed, that has the force of law. Some of the writers of this school do not think of the rules which courts lay down as constituting law unless or until there is certainty that the rule will be followed by courts in future cases. See Digby, History of the Law of Real Property (5th ed.) 64; Salmond, *op. cit.*, § 66. Such a view seems to confuse the facts of the existence of law with prognostications as to how courts will decide cases. It would seem less befogging to admit that courts do sometimes actually over-rule precedents and set aside existing rules of law. The rule which a court lays down in making its decision should be looked upon as law because of the usual practice of courts to follow the rules which they lay down,—not because it is certain that the particular rule will be followed in the future.

An excellent example of the confusion that results from failing to distinguish between law and prognostications as to how courts will decide cases or opinions as to how courts should decide them is illustrated in the remarks of Professor Albert Kales at the 15th Annual Meeting of the American Law School Association, where he said, there are "different common laws for different law schools, and different common laws for different courses in the law schools." Handbook of the Assoc. of Amer. Law Schools and Proceedings of the 15th Annual Meeting, at p. 113.

There are two thoughtful articles in 11 Michigan Law Rev. 1, 109, by Professor Bingham, on the topic "What is the Law?" For him, a rule of law is "a generalized abstract comprehension of how courts would decide concrete questions within its scope." 11 Michigan Law Rev., at p. 22.

[6] 1 Bl. Comm. 69; Norway Plains Co. *v.* B. & M. R. R. (1854) 67 Mass. 263, 267; Swift *v.* Tyson (1842) 41 U. S. 1; Harbert *v.* Monongahela River R. R. (1901) 50 W. Va. 253, 40 S. E. 377; Storrie *v.* Cortes (1896) 90 Tex. 283, 38 S. W. 154; Ketelson *v.* Stilz (1916) 184 Ind. 702, 111 N. E. 423.

down in deciding cases constitute law[7] has been adopted by many thinking lawyers and by practically all of the leading American and English writers on jurisprudence.[8]

Recently there has been a renewal of the conflict between these theories. Professor Gray, in a book embodying his ripest thought, reached the conclusion that "The Law * * * is composed of the rules which the courts * * * lay down for the determination of legal rights and duties."[9]

On the other hand, despite the general drift of the more thoughtful members of the legal profession away from the Blackstonian theory, there is one notable exception. Professor Beale, in his more recent "Treatise on the Conflict of Laws", only Part I of which has as yet been published, champions the theory of pre-existent law and rejects Professor Gray's view; *i. e.*, the view that "the decision of a court in and of itself constitutes law." He gives specific reasons for discarding this view.[10]

It is the purpose of this paper to show that, first, the orthodox common law theory does not accord with the facts of the origin and growth of the law; second, it works undesirable and unjust results in the decisions, and hampers a proper development of the law. In the course of the discussion it will appear that the theory that the courts make law is not open to these objections.

First, the orthodox common law theory of pre-existent law does not accord with the facts of the law's origin and growth.

Without assuming the orthodox theory to be erroneous or the theory that courts make law to be sound, let us consider the way in which the rules the courts lay down originated and developed. It seems to be agreed by legal historians that in early Anglo-Norman society judgments of courts preceded custom and legislation

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[7] *Op. cit.*, at p. 652.

[8] Among the English writers taking this view are: Holland, Jurisprudence (12th ed.) 65 *et seq.*; Salmond, *op. cit.*, § 62; Maine, Ancient Law (3rd Am. ed.) 29 *et seq.*; Digby, *op. cit.*, 63; Markby, Elements of Law (5th ed.) §§ 98-99; Dicey, Law and Opinion in England, 361-362; 2 Bryce, *op. cit.*, 269-281. Among the American writers are: Holmes, Common Law, 35. See also excellent statement in dissenting opinion of Mr. Justice Holmes in Kuhn *v.* Fairmont Coal Co. (1910) 215 U. S. 349, 30 Sup. Ct. 140; Ezra B. Thayer, Judicial Legislation, 5 Harvard Law Rev. 172; many articles by Roscoe Round, particularly, Common Law and Legislation, 21 Harvard Law Rev. 383, and, Justice According to Law, 13 Columbia Law Rev. 696, 14 Columbia Law Rev. 1, 103.

[9] The Nature and Sources of the Law, § 191.

[10] At pp. 148-149. His objections to the theory that the courts make law will be considered later.

and that there was a time when there were no rules which antedated judgments and guided courts in making their decisions.[11]

With the development of the concept of equality and justice, the similarity of essential facts was observed in the earlier cases and made the basis of a formulated rule to serve as a guide for future cases. This process has extended over the whole field of litigated questions, so that a modern court called upon to decide a case will most frequently find, laid down in earlier cases, the rules needed for the determination of this particular controversy. When this is true, the court makes the decision by applying the pre-existing rules, and it does this usually without inquiry into the ultimate source of the rule. But as society developed from the simple to the complex, cases constantly arose, touching which no rule had as yet been formulated by the courts. A careful scrutiny of the cases shows this is frequently the situation even today. In such a case the court will lay down a new rule and decide the case by it, and this new rule will serve as a guide in future cases. There are many possible sources from which the court derives the new rule. The earlier analogous cases and expediency are principal sources.[12] Of the other sources, legislation and morality are increasing in importance, while custom is on the decline.[13]

If the new rule is derived from custom, expediency, or morality, it usually is not difficult to perceive that the rule is one newly enunciated by the court. If, however, the rule is derived from the earlier analogous cases, the fact that the court has enunciated a new rule may not always be apparent. Frequently the rule and its sources are confused. The process of its derivation tends to obscure the existence of the new element. The earliest cases are classified and distinguished, and a new rule for the case under consideration derived from them. It is compared with and tested by cognate lines of decisions, and in its final form laid down and the case decided according to it.[14]

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[11]John Henry Wigmore, Problems of the Law's Evolution, 4 Virginia Law Rev. 247; Maine, *op. cit.*, c. 1; Maine, Early Institutions, c. 13; Markby, *op. cit.*, 63; Street, Foundations of Legal Liability, 5; Gray, *op. cit.*, § 634.

[12]2 Austin, *op. cit.*, Lecture 37; Holmes, *op. cit.*, 35-36; Salmond, *op. cit.*, c. 9.

[13]Gray, *op. cit.*, c. 12, §§ 628, 634, c. 13.

[14]Ezra B. Thayer, Judicial Legislation, 5 Harvard Law Rev. 172, 182.

The new rule created by the court may not modify existing rules but merely stand out as a new and distinct rule, yet frequently the new rule involves the narrowing of the *ratio decidendi* of the earlier cases. It is

Sometimes the sources of the rules are easily traceable, and sometimes the rules come forth without any apparent source and even contrary to such sources as are discoverable. It is difficult to discover the source of the rule of the indestructibility of executory devises, first laid down in *Pells* v. *Brown.*[15] Professor Gray has shown it could not have previously existed in custom, usage, or opinion.[16] The same thing may be said of the rule first laid down in *Collen* v. *Wright,*[17] that an agent impliedly warrants his authority. In both these cases the rules were reasonably consistent with analogous rules and were not positively inconsistent with any other source. But take *Dumpor's Case,*[18] where the lease contained a condition that "the lessee or his assigns should not alien * * * without the special license of the lessors", and the court laid down the rule that a license, once given, destroyed the validity of the condition; or the rule in *Spencer's Case,*[19] that a covenant which touches or concerns the land will not run if it relates to a thing not *in esse,* unless assigns are mentioned; or the rule that the destruction of buildings or premises demised, though the chief consideration for the payment of the rent, does not put an end to the lease or relieve the lessee of liability thereon or for the payment of rent. We have, here, examples of arbitrary rules without foundation in precedent, custom, reason, justice, or other source. Yet these rules have been followed and have stood the test for more than three centuries. Readers of this paper will readily think of other similar instances. Such rules illustrate a fact which it is important to bear in mind, namely, that the rules which

a common trick of judges in their opinions, when they wish to lay down a rule or make a decision substantially opposed to an earlier case or cases, to narrow down the *ratio decidendi* of such case or cases by showing that the decision depended upon the special facts of the case. After the later decision, the earlier cases will stand for a different rule than they stood for before. Again, the effect of the later decision is frequently to enlarge the old rule. For example, in Rylands *v.* Fletcher (1863) L. R. 3 H. L. 330, the court laid down the rule that a person who brought water on his premises was bound to keep it at his peril. Previous to this case courts laid down the rule of absolute liability for trespassing cattle and for escaping filth and noxious fumes. But no rule of liability for escaping water existed before Rylands *v.* Fletcher. In each of these cases of absolute liability there is the common element of something brought onto the premises which is likely to escape and cause damage. Later cases may define liability in terms of this broader general rule. As yet it has not been done.

[15] (1620) Cro. Jac. 590.

[16] *Op. cit.,* §§ 505, 506.

[17] (1857) 8 E. & B. 647.

[18] (1603) 4 Co. 119*b*.

[19] (1622) 5 Co. 16*a*.

the courts follow are usually followed regardless of their source. The courts do not treat them merely as evidence of some pre-existing entity, but the rules stand out as independent sources.

So far we have been considering the development of the rules the courts lay down. It is evident that a history of the growth and development of these rules will be identical with a history of the growth and development of the law, where such rules are conceived as constituting the law. Judges have imposed upon them the duty of deciding disputes and they must decide all disputes that are brought before them. In performing this duty they have discovered they can do it more adequately and justly by laying down rules which will not only serve them as guides for future cases but will also serve as guides for men generally in their business and social relations. To these rules legal historians apply the term "law", and they conceive the whole system of the common law to have been erected by the courts as a by-product of the administration of justice.[20]

But, where law is used in the orthodox sense, such a history would have a different content and require a different treatment. Let us consider now the genesis and development of law where the concept of law is that of the followers of the orthodox theory.

Followers of this school have given little thought to the genesis of law. Occasionally suggestions are met with that law always existed. We find it boldly asserted by some advocates of this theory that law came into existence simultaneously with the origin of society, as a complete system of rules adequate to meet every situation that might arise and capable of change only by legislative power.[21]

Other advocates of this theory have recently expressed the view that law grows and develops apart from legislative changes. Apparently it is Mr. Carter's view that law grows and changes with the growth and change in the customs or opinions which constitute the law.[22]

Two at least of the ablest exponents of pre-existent law admit that the common law has grown by means of court decisions. Pro-

[20]Maine, Ancient Law; Maine, Early Institutions; Maine, Early Law and Custom; Salmond, *op. cit.*, c. 4, 9; Dicey, *op. cit.*, 361-362.

[21]3 Beale, Cases on Conflict of Laws, 502, 503, where the author says, "We have seen that law came into being originally at the foundation of society and has since been changed only by some legislative power. * * * Law once established continues until changed by some competent legislative power."

[22]*Op. cit.*, 327-333.

fessor Hammond says, "In the historical aspects of the system, they" (the courts) "have actually made new law."[23] Professor Beale says, "The law of today must of course be better than that of seven centuries ago, more in accordance with the general principles of justice, more in accordance with the needs of the present age, more humane, more flexible and more complex. There are many sources of this change of law, of which, it is true, the decisions of the courts are one and in many ways the most important."[24]

A complete answer to the view that the law has always existed, or existed from the foundation of society, except for changes introduced by legislative bodies, is found in the simple question put by Professor Gray: "What was the Law in the time of Richard Cœur de Lion on the liability of a telegraph company to the persons to whom a message was sent?"[25] This *reductio ad absurdum* disposes of this view.

Where law is thought of as usage, custom, or opinion, a change in these will constitute a change in law, and such growth is not inconsistent with the orthodox theory. The difficulty lies in reconciling the theory that law is a complete system of rules always pre-existent and sufficient for every case that arises, with the fact that there are many cases constantly arising in which there is no possibility of finding any pre-existent usage, custom, opinion, or rule of any sort. Perhaps it was the inadequacy of this view of the pre-existent theory of law to meet the obvious facts that caused these two advocates, Professor Hammond and Professor Beale, to admit that law grows by means of court decisions. But when they admit that court decisions change law, have they not shifted from the theory that law is pre-existent to the theory that law grows by means of court decisions, that is, that courts make law?

Professor Beale does not think of a decision changing the law directly, but the decision reacts upon the sub-stratum law or professional opinion, as he conceives it, and changes it so that it stands a changed thing, ready to be applied to new cases that arise thereafter. The first objection to the view that a decision which changes the law must do so by effecting a change in the opinion of the legal profession, or custom, or whatever else law is conceived as being is that it is contrary to the facts. Courts do not inquire whether

[23]Note Bl. Comm. 68-71.

[24]1 Beale, Treatise on Conflict of Laws, 149-150.

[25]*Op. cit.*, § 222.

the decision has changed the opinion of the legal profession or custom. In fact, the legal profession may never have consciousness of its existence, nor people know of it; but, as we have seen, the courts will follow the decision itself, independent of change in any hypothetical or fictitious sub-stratum.

A second objection to this view, that a court decision may effect a change in law where law is used in its orthodox sense, is that it deprives this theory of the only alleged advantages it possessed over the theory that courts make law. The advantages claimed are: first, that it makes the judges mere passive interpreters of the law and thus secures them against improper influences and motives; and second, it does not require, as does the theory that courts make law, that judges make retroactive law.[26]

[26]Professor Beale criticizes the theory that courts make law on the ground that it is a usurpation of the legislative function by the courts to make retroactive law. He states his objections in the form of four reasons "for discarding the view that the decision of a court in and of itself makes law".

His third and fourth objections are answered in the discussion of the undesirable and unjust results the orthodox theory works in the decisions. A statement of the first and second objections and obvious answers to them are given here. He says at page 148, *et seq.*, *"First,* the function of changing the law has never been committed by the sovereign to the judge, and consciously to make a change in the laws would be a usurpation on the part of the judge. This usurpation the judges strenuously deny, and have claimed that in no case were they exercising the power of changing the substantive law. If then they make law they do it unconsciously, by inadvertence, and contrary to their legal duty and their official oath."

To this objection it may be replied that it is not an argument but it is merely a restatement of the orthodox common law theory of law and of the function of the judge, coupled with the assertion of the fact, which everybody admits, that such theory is current among judges. If the practice of the courts is not in harmony with this view of law and the office of courts in changing law is desirable, as Professor Beale implies, *supra,* footnote 24, it would seem time to change this view of the law.

Continuing, Professor Beale says, *"Second,* if the judge makes the law he declares, then the law did not exist at the commission of the alleged wrong with which he is dealing in the litigation. In that case, if he decides that a right existed, he is creating the right, subsequently to the doing of the act, and the defendant is held for a wrong which was not a wrong at the time he did it. This is contrary to all conceptions of justice."

The answer to this argument against the theory that courts make law is this: The alleged injustice is not made less by conceiving the declaratory theory or any other theory to be the sound one. For, the substantial fact remains that, under the declaratory theory as to the nature of the law, it is no easier for the parties to ascertain what the law was before the court decides the case than it would be for the parties to prognosticate, under the theory that courts make law, what the law will be. There is as much data for guessing what the decision will be, which is the vital fact, if we accept one theory or the other. The existence of rights and duties of which a man has no knowledge is the same to him for all substantial purposes as if they did not exist. As Professor Gray puts it, "the law of which a man has no knowledge is the same to him as if it did not exist." Gray, *op. cit.,* § 225.

Stripped of these advantages, the theory has no justification for being. Can these advantages be retained and the theory harmonized with the growth of the law by means of court decisions? It is submitted that they cannot. To have a court decision effect a change in law, we must have a decision which does more than merely apply pre-existing law, for, if the court merely applies pre-existing law, no change can be wrought by that decision. To secure a change or growth in law through court decisions we must have judges violating their duty if their duty is that of mere passive interpreters of the law. Of course, in accordance with that form of the orthodox theory which makes decisions conclusive evidence of the law, the judges can neither make retroactive law nor overstep their duty. For law cannot be changed by them, since by hypothesis, the decisions always accord with the pre-existing law. But, if the other form of this theory is taken, namely, that occasionally decisions are made which do not correspond with the law, their departure from the law, while possible, deprives the theory of the very advantages which are its excuse for existence. The court by not following the pre-existent law makes an act a wrong which was by positive law not a wrong at the time it was committed, and the court has deprived itself of the advantage of being guided by established rule rather than being influenced by other causes. The conclusion then seems inevitable that law as conceived by followers of the orthodox theory cannot be reconciled with the fact of the laws' growth. Further, to assume that decisions that depart from the law and are followed by subsequent cases do not effect a change in law unless there is a change in some sub-stratum or ideal something existing apart from and beyond or behind them, is to adopt the discarded doctrine of *nicht positivliches recht.* For until the change takes place the rules of the court and the sub-stratum are discordant. In other words, we reserve the word "law" to apply to that ideal sub-stratum having only a fanciful existence, and this precludes us from using it to mean the rules the courts actually lay down and follow in the determination of legal rights and duties. In fact, any view of the theory of pre-existent law which considers that the decisions may not square with the law but are merely evidence of it leads inevitably to that absurd doctrine.[27]

[27]For example, let us suppose a situation that is not uncommon. Two cases come before courts of two different jurisdictions involving a decision on the same question. Now it may be that there are no decided cases in point in either jurisdiction and so far as human acumen can discover the sources in the two jurisdictions upon which the respective courts depend are identical, that is, the law is alike in each, and yet the courts

Now let us turn from the theoretical to the practical side. It will appear that the theory of pre-existent law works undesirable and unjust results in the decisions, while the theory that courts make law does not. The best illustration of an undesirable result that may be ascribed to the orthodox theory of law is the doctrine of the federal courts with respect to the so-called general commercial law. Where the federal courts acquire jurisdiction because the parties are citizens of different states, they exercise a jurisdiction concurrent with the courts of the state in which they sit, and they administer the law of that state. The theory that the decisions of the courts do not constitute law but are merely evidence of it makes probable a divergence of view between federal and state courts as to what the law of the state is. As these two systems of courts of co-ordinate jurisdiction have no common superior, contradictory rules may be established as guides for the respective courts. It was proceeding on this theory of pre-existing law that Mr. Justice Story in *Swift* v. *Tyson*[28] held that the federal courts, when exercising jurisdiction concurrent with the state courts, were not bound to follow the decisions of the state courts in matters relating to the general commercial law. Prior to this case, there had been, in New York, decisions which, though not entirely clear, seemed to favor the rule that a person who took a bill of exchange in payment of a pre-existing debt was not a purchaser for value. Mr. Justice Story held, however, that the plaintiff, who had taken a bill of exchange in payment of a pre-existing debt, was a purchaser for value. The case of *Swift* v. *Tyson*

reach contrary decisions. The difference in the decisions may be the result of a difference in the presentation of the cases, or a difference in the temperament or bias of the court, or a difference in a thousand and one other circumstances. On the other hand, we may suppose that there is a difference either in the earlier cases or other sources upon which these courts of different jurisdiction depend, that is, the law is different in each jurisdiction, and yet the courts reach like decisions. Now it must be admitted that such results are quite possible. If the ideal pre-existing entity known as law is alike in the two jurisdictions and the decisions are different, or if the law was different and the decisions are alike, one court at least has failed properly to declare the law. The law is not in accord with the rule laid down by the court for the decisions in that case —but this decision may be followed consistently where it was rendered. The result is that we have a rule laid down and followed by the courts which creates civil rights and duties and yet is not law; but that ideal entity which the courts have refused to recognize and have repudiated must be treated as law. See Gray, *op. cit.*, §§ 215-221, where Professor Gray shows the untenableness of the doctrine of pre-existent law by supposing cases like that of Rylands *v.* Fletcher, *supra,* footnote 14, to be decided differently in two different jurisdictions where there are no precedents.

[28] *Supra,* footnote 6.

came up to the United States Supreme Court from the Circuit Court for the Southern District of New York and it would have been possible for the Court to have placed its decision squarely upon the ground that there was no state law in New York, and it was, therefore, incumbent upon the Supreme Court, as a federal court of appeal for New York state, to make the law for New York state. But the Supreme Court did not do that. Mr. Justice Story seems to have rested the decision upon the ground that the decisions of the New York courts were not directly, in themselves, the law of New York state. He said that the decisions of the New York courts were not obligatory upon the federal courts, even "admitting the doctrine to be fully settled in New York" for "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws."[29] *Swift* v. *Tyson* was followed by the Supreme Court in later cases, and it is the settled doctrine of the federal courts that they are not bound to follow the decisions of the state courts as to general commercial law. *Swift* v. *Tyson* brought forth a storm of denunciation. What an extraordinary result! Two independent systems of courts applying opposing rules in the same jurisdiction in the administration of justice, and a man's rights dependent upon the tribunal which hears his case. Professor Gray says of this doctrine, "from a 'scientific' point of view, nothing could be more shocking. It seems a recurrence to barbarism, to times when Burgundians, Visigoths, and Romans, living beside each other, had their own separate and tribal laws."[30]

The doctrine of the federal courts as to the general commercial law is without justification and without defenders.

While this admittedly deplorable doctrine of the federal courts was inaugurated by following the theory that court decisions are not law but merely evidence of it, the doctrine is not consistent with the theory. If the theory were followed consistently it would apply to all the decisions of the state courts, those relating to land and local law as well as those relating to general commercial law. But the courts have not applied it to such situations. The doctrine is anomalous and not explicable by either theory.

An illustration of the unjust results reached by applying the theory that decisions do not constitute law but are merely evidence

[29] At p. 18.

[30] *Op. cit.*, § 481.

of it is found where an earlier decision or decisions have been over-ruled by a later one and the question is raised in a third case as to what the law was after the earlier decision but before the over-ruling one. If this theory is applied, the over-ruled decision must be looked upon as never having been law and over-ruled for that reason. For if decision *A* is over-ruled by decision *B* and the question is raised in case *C* as to what was the law after decision *A* but before decision *B*, the retroactive operation of decision *B* is not involved unless the court in case *C* considers *B* as the law or in accordance with the law since decision *B*; and if *B* is the law, then *A* could never have been the law according to this theory of law, since *B* is a correct declaration of pre-existing law and is contrary to *A*. It would seem then logically necessary under the theory that courts merely declare pre-existing law that an over-ruling decision should operate retroactively if such decision is to stand at all.[31]

On the other hand, if the decisions of the courts make the law, the over-ruling decision need have no retroactive operation beyond that involved in the decision itself, because the over-ruling decision merely changes the law from the time it is made and leaves the law prior to that time unchanged.

The earliest case in which this question was raised was *Gelpcke* v. *City of Dubuque*.[32] In several decisions the Supreme Court of Iowa, prior to 1859, had upheld the constitutionality of a statute authorizing municipal corporations to subscribe for the bonds of railroad companies.[33]

In 1859 the court restrained a proposed issue on the ground of its unconstitutionality,[34] and later, in 1862, the court over-ruled the earlier decisions and held the statute unconstitutional.[35] In 1857 the city of Dubuque issued bonds in compliance with this

[31]It has been argued that consistently with the orthodox theory of law an over-ruling decision need not be given a retroactive operation beyond the decision itself, that the effect to be given to an over-ruling decision depends entirely upon considerations of expediency and sound policy. But that is merely a different way of saying that where it makes a difference the over-ruling decision will not be given retroactive effect; in other words, until changed by the over-ruling decision, the rule of the over-ruled decision will be treated as law because of considerations of expediency and sound policy.

[32](1863) 68 U. S. 175.

[33]Dubuque Co. *v.* Dubuque & Pacific R. R. (Iowa, 1853) 4 Greene 1; State *v.* Bissell (Iowa, 1854) 1 Greene 328; Clapp *v.* County of Cedar (1857) 5 Iowa 15; Ring *v.* County of Johnson (1858) 6 Iowa 265.

[34]Stokes *v.* County of Scott (1859) 10 Iowa 166.

[35]State *v.* County of Wapello (1862) 13 Iowa 388.

statute and the plaintiffs were holders for value of some of these bonds. Action was brought in the United States District Court of Iowa and that court held the bonds invalid; but the United States Supreme Court reversed the judgment. The Court based its decision on the ground that to give the over-ruling decision a retroactive effect would violate the provision of the federal constitution that "No state shall pass any law impairing the obligation of contracts". But the decision cannot rest upon that ground because the Iowa decision which it was claimed impaired the obligation of contracts was not before the Court, and later decisions have held that the prohibition of the Constitution applies only to legislative acts and not to judicial decisions.[36] Of course if a state court has interpreted a statute the Supreme Court will accept that interpretation in determining whether it violates the Constitution of the United States, but that is not reversing a decision of a state court because it impairs the obligation of a contract. There is no constitutional prohibition against state courts over-ruling earlier decisions though they impair the obligation of contracts and deprive persons of vested property rights, and there is no constitutional restriction upon state courts giving retroactive effect to the over-ruling decisions.[37]

It must be admitted that courts have generally given retroactive effect to decisions which have over-ruled earlier precedents; and this is consistent with the Blackstonian theory.[38]

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[36]Central Land Co. *v.* Laidley (1895) 159 U. S. 103, 16 Sup. Ct. 80; Bacon *v.* Texas (1896) 163 U. S. 207, 16 Sup. Ct. 1023; Turner *v.* Wilkes County Commissioners (1899) 173 U. S. 461, 19 Sup. Ct. 464. Muhlker *v.* Harlem R. R. (1905) 197 U. S. 544, 25 Sup. Ct. 522, is *contra* to the statement in the text and it is submitted that the case is wrong. It has been frequently cited and distinguished but never followed. Mr. Justice Holmes' dissenting opinion in the case seems unanswerable.

[37]Farrior *v.* New England Mortgage etc. Co. (1890) 92 Ala. 176, 9 So. 532; County Commissioners *v.* King (1870) 13 Fla. 451; Haskett *v.* Maxey (1892) 134 Ind. 182, 33 N. E. 358; Stephenson *v.* Boody (1894) 139 Ind. 60, 38 N. E. 331; Harris *v.* Jex (1874) 55 N. Y. 421; Hill *v.* Brown (1907) 144 N. C. 117, 56 S. E. 693; Menges *v.* Dentler (1858) 33 Pa. 495; Geddes *v.* Brown (Pa., 1863) 5 Phila. 180; Herndon *v.* Moore (1881) 18 S. C. 339; State *v.* Mayor (1902) 109 Tenn. 315, 70 S. W. 1031; Rutland R. R. *v.* Vermont Central R. R. (1890) 63 Vt. 1, 21 Atl. 262, 731. The cases are all collected in 29 Harvard Law Rev. 80 in an excellent note to the case of State *v.* Longino (1915) 109 Miss. 125, 67 So. 902, a criminal case in which the over-ruling decision was not given retroactive effect.

[38]Center School Township *v.* State (1898) 150 Ind. 168, 49 N. E. 961; Gross *v.* Board of Commissioners (1902) 158 Ind. 531, 64 N. E. 25; Mountain Grove Bank *v.* Douglas County (1898) 146 Mo. 42, 47 S. W. 944; Lewis, Auditor *v.* Symmes (1899) 61 Ohio St. 471, 56 N. E. 194; Allen *v.* Allen (1892) 95 Cal. 184, 30 Pac. 213; Stockton *v.* Dundee Mfg. Co. (1871) 22 N. J. Eq. 56; Storrie *v.* Cortes, *supra,* footnote 6.

It should be pointed out in passing, however, that avoidance of retroactive effect is one of the alleged advantages of the theory of pre-existent law, in fact, its *raison d'être,* and the main objection of its advocates to the theory that courts make law. But it should be observed that these cases are not inconsistent with the theory that decisions constitute law and that an over-ruling decision will change law. If the court has power to give the over-ruling decision a retrospective operation as to the parties concerned, so may the subsequent decisions which involve transactions that arose prior to the date of the over-ruling decision do likewise. There does not exist, however, the same reasons for giving the later decisions a retroactive effect as was given to the earlier over-ruling decision. The original over-ruling decision got rid of an objectionable rule of law and in so doing may have deprived parties of rights acquired under the earlier decisions, but once rid of the rule there is no call for the sacrifice of more victims upon the altar of reform; and, if we follow the theory that an over-ruling decision changes law, no later case need be given a retroactive effect unless for some reason peculiar to that case.[39] Where the question as to the effect of an over-ruling decision arises in a foreign jurisdiction, however, a choice between the theories is imperative. To give the over-ruling decision in such a case a retroactive effect is to follow the theory that court decisions are merely evidence of the law, and to refuse to give it such effect is to adopt the theory that court decisions are in themselves law.[40]

Courts should not permit their theory to drag behind their practice. In actual practice they, here and there, break away from the orthodox theory, but on every turn they are hampered by it. Much of the unreasonable conservatism, the meaningless technicality and the senseless multiplicity of distinctions in our law which have helped to engender the disrespect and animosity of the lay-public towards the administration of justice result from the courts following the theory that law consists of a complete and closed system of pre-existent rules, that it is the function of the court to discover and apply these rules, that they have no power to change them, and that a departure from them would constitute a violation

[39]Perhaps in many of the cases which purport to follow the theory that decisions are merely evidence of the law it is desirable that the particular case should be decided as it was regardless of the existence of the over-ruled decision. Center School Township *v.* State, *supra,* footnote 38; Gross *v.* Board of Commissioners, *supra,* footnote 38; Mountain Grove Bank *v.* Douglas County, *supra,* footnote 38; Lewis, Auditor *v.* Symmes, *supra,* footnote 38.

[40]In Faulkner *v.* Hart (1880) 82 N. Y. 413, the court held that the later decison represented the law during the interim.

of their judicial duty and a usurpation of legislative function. It is time courts perceive that they perform a two-fold function, one of deciding disputes and the other of laying down rules of law for future guidance. They should see with Mr. Justice Holmes, that "* * * in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned."[40a] They must perceive that the doctrine of *stare decisis* is court-made and rests largely upon the habit or custom of courts to follow precedent, and that the real objection to changing an established rule lies, not in the court's lack of power, but in considerations of justice and expediency. A change of rule may operate retroactively and annul transactions entered into or impair the obligations of contracts or deprive persons of rights acquired and interests vested under the established rule. It may introduce uncertainty as respects future transactions, especially in those instances where the over-ruling decision needs to be followed up by others holding similarly, or where the over-ruling decision may be inconsistent with and impair the authority of cognate precedents. And the acknowledged power to change law brings with it the danger of judges substituting for the wisdom of the past their individual judgment of justice and expediency, and of being controlled by improper influences and motives in making their decisions. These are certainly adequate checks upon hasty action by the courts. They need no restraints based upon false beliefs.[41] Courts must perceive these facts before there is any hope of their performing, in an adequate and intelligent way, their legislative function. Until they possess a more fundamental knowledge of the history and evolution of law and are able to break away from both the bugaboo of a lack of power to make or change law and the exaggerated fear of usurping legislative function, we cannot hope for the development of a consistent, scientific, and adequate system of judiciary law.

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[40a] Holmes, Common Law, 35.

[41] This danger will be less in proportion as the legal profession is thoroughly grounded in the law. 5 Harvard Law Rev. 200-201; Salmond, *op. cit.*, § 62; 2 Bryce, *op. cit.*, 285-287.